FORMS OF LAW AND MORAL CONTENT

By Fowler V. Harper*

I

Regardless of the view taken of the nature of law, the controversy about which, as has been well pointed out, is in large part due to the failure on the part of jurists to discuss the same thing,[1] it remains obvious that law must be manifested in a variety of forms. By *forms* of law is not intended the particular type of law such as statutes, constitutions, decisions, etc., dependents upon the particular governmental agency responsible for their enunciation. But by *forms* of law in the sense here contemplated we understand the character of the legal declaration as regards the extent to which that declaration is applicable as law. A study of forms of law in this sense involves a consideration of the particular kind of intellectual conception employed to express the legal doctrine. The Continentals, in using the word *form* in much the same sense, speak of it as the method of ordering thought.[2] In other words, the term denotes the essential conceptions of thought involved in expressing law,[3] with the *pure form* designating the uniform method of ordering. In this character, a consideration of forms of law involves the problems of the manner in which legal precepts function and the mode of application of the same by the courts.

We may regard the great body of substantive law as consisting of an accumulation of *rules, principles* and *standards.*[4] It is the use made of these forms which constitutes the application and administration of law, and a study of that application and administration is fruitful in an attempt to understand the nature of these different forms. The simplest conceivable form of law is the legal rule. The rule is a *particular conclusion.* It is the least complicated of legal forms and its operation usually involves little

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1. See *Pound* "Theory of Judicial Decision" (1923) 36 Harv. Law Rev. 641, 643.

2. See *Stammler* "Fundamental Tendencies in Modern Jurisprudence" (1923); 21 Mich. Law Rev. 881, 882-883; cf. "Theory of Justice" 133 (1925).

3. See *Del Vecchio* "Formal Bases of Law" sec. 81, 82 (1914); ibid., editorial preface by Joseph Drake, xxii.

4. See *Pound* "Theory of Judicial Decision" supra, 645, 646.

difficulty for the courts, although this does not necessarily follow, as some striking illustrations will indicate.[5]

The nature of the legal rule is distinct in that it prescribes particular operative facts upon which a certain particular legal conclusion or result shall be predicated. The operative facts we understand to be such facts or series of facts as produce some kind of legal consequences.[6] The rule, then, sets forth not only what the legal consequences shall be in a given situation, but it determines with particularity just what facts shall be operative to produce these legal consequences. Thus the criminal law rule with respect to burglary, for example, sets forth and describes the operative facts, namely, the breaking and entry of a dwelling, etc., in the night-time, with the intent to commit a felony. The rule thereafter prescribes the legal consequences ensuing, namely, guilt of burglary to be punished with confinement in the penitentiary. The statute of descent and distribution similarly declares what operative facts shall produce a particular result, setting forth both the operative facts and the consequences in law. Rules of this nature may require interpretation by the courts, but once interpreted their operation is a simple enough process.

Likewise in actions for tort facts which the law has declared operative are alleged in the complaint, and the legal consequences provided by the rule of law involved are invoked in the petitioner's behalf. All that is necessary, assuming that the defendant does not allege further operative facts and invoke further legal consequences according to another rule of law, is to furnish proof of the existence of the facts alleged in plaintiff's petition. It is thus seen that the principal function of the court, in dealing with the rule of law, is to consider the relative value and applicability of the various rules invoked by the litigants, and to consider thereafter pure evidentiary facts.[7] The simplicity of the legal rule, as is suggested by the foregoing, depends upon its particularity. It operates specifically and exclusively upon certain particular facts, as provided in the rule itself. These facts once established, the legal consequences are determined and the functioning of the rule is complete.

5. The rule in *Shelly's* case seems to be a typical example.

6. For distinction between operative facts and legal consequences, see *Hohfeld* "Fundamental Legal Conceptions" (Cook's ed. 1925) 27-32. Cf. Salmond's "vestitive facts" in "Jurisprudence" (7th ed.) 357-359. Cf. also *Holland* "Jurisprudence" (13th ed.) 158-159.

7. For distinction between operative facts and evidentiary facts, see *Hohfeld* supra, 32-35.

The legal principle, however, is by no means so simple, and it often gives rise, by its very nature, to considerable difficulty. The principle is a *general conclusion.* In passing from the particular to the general, or in going from the general to the particular, the intellectual processes are distinctly more complex than in the mere application of a particular conclusion, and the courts encounter obstacles. That this difficulty is commonly experienced is evidenced by the constant propensity of judges to reduce principles to rules with which they feel on more intimate terms. The difficulty is due to the fact that the principle, being general, prescribes the legal consequences that shall ensue, not from particular operative facts, but from a general kind of operative facts, leaving the facts themselves to be determined in some other way. The function of the court is here twofold. When the preliminary question of the relative value and applicability of various conflicting principles has been determined for the specific case, the most difficult part of the court's duties yet remains. Not only must evidentiary facts be considered to determine whether certain operative facts be present under the circumstances, but it must determine what operative facts shall fulfill the general requirements imposed by the legal principle as requisites for producing the legal consequences provided therefor.

That liability attaches when a defendant has produced an injury to another, even though unintentional and without malice, providing the defendant has been legally negligent, is a principle long established in the law of torts. Here, however, are provided certain legal consequences for a general kind of operative facts, the particular facts themselves, in any given situation being undetermined as to their legal consequences. Consequently when the court has to consider a situation involving this principle, two processes must take place: (1) the evidentiary facts must be sifted and weighed to determine what ultimate facts are present—the *factum probandum* must be established from the *factum probans;*[8] (2) these ultimate facts, *factum probandum,* must be considered to determine whether or not, in the particular instance, they shall be deemed operative to produce the legal consequences designated in the legal principle. In other words, the facts in the case, as proved, must be regarded to determine whether or not they come within the principle. This second function of the court, in handling legal principles, is, of course, the difficult one. The principle

8. See *Wigmore* "Evidence" (2nd ed.) sec. 2.

once given, the succinct observation of Mr. Justice Holmes is pertinent: "general principles do not decide concrete cases."[9]

As a typical example of the legal principle might be cited that broad axiom of governing power which lawyers refer to as the "police power." By virtue of the police power, the government may lawfully impose certain restrictions upon individual exercise of liberty and may place such restraints upon the enjoyment of legal rights as may be deemed reasonably necessary to prevent the abuse of similar rights by the careless and unskillful, to the detriment of society.[10] Here is uniformly recognized a principle, broad and general in its scope, and one within which continually varying series of operative facts may, from time to time, be brought.[11] In truth, no phase of the law has been subjected to more or to greater expansion than has this principle, or rather than has its application, and many facts which a few years ago would not be operative, as falling within the limits of this principle, are now fully conceded to come within its provisions.[12]

This twofold function of the courts, the treatment of evidentiary facts and the determination of operative facts as well, gives occasion for many conflicting views and for a steady growth in the law. In the last analysis, the principle asserts certain fundamental premises, the deductions from which will largely depend upon public policy and the growth and development of the various interests intended to be protected by the principle in question.[13] The police power, as a principle intended to protect cer-

9. Dissenting opinion in *Lochner* v. *New York* (1905) 198 U. S. 45, 76.

10. *Freund* "Police Power" (1904) sec. 8.

11. See the pertinent quotation by Mr. Justice Eakin in *Stettler* v. *O'Hara* (1914) 60 Oregon 519.

12. Cf. the decision in *Lochner* v. *New York* supra, with the decision in *Bunting* v. *Oregon* (1917) 243 U. S. 426. In the former decision the New York statute prohibiting bakers from working for more than ten hours in one day was pronounced unconstitutional. In the *Bunting* case, a similar Oregon statute, not restricted in its operation to bakers, was pronounced valid. The New York decision did not turn upon the equal protection of law clause, but upon the due process clause. This means that the social interest in the welfare of bakers was not sufficient to justify the protection sought to be afforded them under the police power. Approximately the same interest was great enough to invoke the operation of the principle in the *Oregon* case.

13. With legal *principles*, there should be no confusion of such broad postulates of legal reasoning as "no wrong without a remedy," "no liability without fault," and the like. These seem to be mere inductive assumptions rather than premises from which judicial reasoning should proceed. They may be regarded as formulae or maxims expressing the general policy of the law, or assumptions from deductions made from legal principles. It seems erroneous, however, to consider them as, in themselves, principles of law.

tain interests, has expanded as the importance of the various interests themselves, from time to time, has warranted.

Since principles are insufficient, in themselves, to determine concrete cases, it is obvious that something further is necessary to complete the process of the administration of the law by the courts. How are the operative facts to be determined? The answer to this query involves the third *form* of law, the legal *standard.* It it a *universal conclusion,* as opposed to the *general conclusion* and the *particular conclusion.* The difficulty in going from the particular to the general is only exceeded by that encountered in passing from the general to the universal and vice versa. The relationship between the legal principle and the legal standard is of vast significance. The standard represents the agency whereby the principle is determined to be operative. In other words, it is the means of determining what facts shall become operative facts. The standard measures the facts in the particular situation, to determine whether they shall be sufficient to bring the case within the legal consequences provided for in the principle.

The police power and its operation are again an instructive example. Modern views of the police power of the state restrict the restraints which may be lawfully imposed upon individual rights to reasonable restrictions.[14] The due process of law clause of the Fourteenth Amendment has been uniformly regarded as so circumscribing the power.[15] So it is that the legal standard must measure the extent to which the principle of the police power is to be applied. When a state legislature enacts a rule of law, it provides for a definite legal consequence upon the contingency of certain operative facts existing. The effect of such a measure may be to deprive individuals of their liberty or of their property. The statute is constitutional and in accordance with the law of the land, however, if it can be shown to be within the police power of the state, or, in other words, if it be within the principle of the police power. The legal consequences of that principle insure the validity of the statute. This means that the rule is within the police power, provided the facts involved are "operative" to invoke the legal consequences of that principle, which are the constitutionality of the statute in question. For the purpose of determining what facts shall be deemed operative or whether the ul-

14. See *Commonwealth* v. *Agler* (1851) 7 Cush. (Mass.) 53, 85; see also *Stettler* v. *O'Hara* (1914) 60 Oregon 519.

15. *Chicago, Burlington and Quincy* v. *Drainage Commissioners* (1906) 200 U. S. 561.

timate facts in the particular instance[16] shall be deemed operative, a legal standard is required. The functioning of the legal principle, the general conclusion of law, is consequently measured by the application of the legal standard, the universal conclusion of law. Thus the rule (statute) in question shall be valid (legal consequences) if it can be brought within the principle (police power); it is within the principle if it conforms to the standard (reasonableness) prescribed by "due process of law." We have in this process of thinking a direct progression from the particular to the general, and from the general to the universal.

It must be obvious that there is much more likelihood of error in the application of a legal principle, depending as it does upon the operation of a standard, than in the application of a mere rule of law, because of the dual nature of the intellectual process involved. This may account for the constant tendency on the part of courts and lawyers, particularly in stagnant periods of the law, to reduce principles to rules by eliminating the standard. Accompanying this there follows, of course, the distinct tendency to substitute reasoning by analogy for deductive and inductive processes.[17] The results which proceed from such tendencies are fatal to the adequacy of the law to meet the continually increasing demands made upon it. Not the least among these injurious effects must be placed the persistence in the use of legal rules long after the reason for the rule has ceased to exist. Thus it is that the rule that a defendant may not be relieved from liability in tort for assault even by agreement to fight exists to this day in many American jurisdictions notwithstanding the fact that a wrongdoer is thereby permitted to profit by his own wrongful acts.[18] The principle, formerly controlling, that no man could lawfully consent to a violation of the king's peace, was applied in the earlier law because of the quasi-criminal nature of the action.[19] The principle, having been reduced to a rule, continues to govern although the complete distinction between criminal and civil actions has entirely removed the former grounds for its applicability.

So, too, is the maxim of equity, *Vigilantibus non dormentibus aequitas sub venit* (Equity aids the vigilant, not those who slumber on their rights) but a mere rule in the statute of limitations,

16. The existence of the statute is here a "fact."

17. See e. g., note 24, post.

18. *Stout* v. *Wren* (1821) 1 Hawks (N. C.) 420.

19. See *Bohlen* "Consent as Affecting Civil Liability for Breaches of the Peace" (1924) 24 Columb. Law Rev. 819, 826-829.

and the standard of "due care" in tort actions has become a rule of law in statutes requiring the plaintiff actually to "stop, look and listen" upon approach to a railroad crossing. On the other hand, however, it must be noticed that a contrary process takes place at times, and a rule is extended and broadened until it develops into what more nearly represents a principle. This seems to take place in precisely the opposite manner, namely, the placing of emphasis upon the reasons for a legal rule rather than upon the rule itself as a strict admonition of logic. So it was that the well known rule that title does not pass in the sale of personal property, if there be anything remaining for the vendor to do to put the goods in a deliverable condition,[20] has given way to the principle that the intention of the parties must govern, although under such circumstances the intention of the parties is presumed to be that title should not pass unless there be evidence to indicate a contrary intent.[21] From a point of view of evidence, a conclusion of law has given way to a rebuttable presumption, which, in the absence only of evidence to the contrary, becomes conclusive. What has actually happened is that a rule of law and logic has given way to the broad principle of intention, depending, as it does, upon the standard of the reasonable man. This seems true notwithstanding that definite rules prevail which, for the sake of certainty, are to be deemed the intention of the parties when there is nothing to indicate otherwise.[22]

How judicial decision sometimes operates to reduce a standard to a rule may be illustrated by the mental process of the court in the minimum wage decision for the District of Columbia.[23] The act of Congress was challenged as being violative of the due process of law clause. It was defended as being within the police power. Instead of applying the test of reasonableness as a standard, the court, speaking through Mr. Justice Sutherland, resorted to a rule of law as established by the historical development of the police power. The various types of statutes which had been adjudicated as complying with the requirements of due process of law and therefore within the police power were considered and

20. *Rugg* v. *Minett* (1809) 11 East 210; *Hanson* v. *Meyer* (1805) 6 East 614.

21. *Turley* v. *Bates* (1863) 2 H. & C. 200. See *Williston* "Sales" (2nd ed.) secs. 268, 269.

22. See Uniform Sales Act, sec. 19.

23. *Adkins* v. *Children's Hospital* (1923) 261 U. S. 525.

classified.[24] Finding that the minimum wage act did not fall within any one of these categories it was concluded, and thereupon decided, that the act was beyond the limits of the police power, and therefore unconstitutional as violative of due process of law.[25] Here, as in the reduction of equitable principles to rules of law, flexibility and elasticity are sacrificed for the corresponding gain in stability and certainty.[26]

It would appear that although there is a continual modification of legal principles and standards into legal rules, and, at the same time, an expansion in the other direction of rules to principles and standards, still the legal form is distinct, and its operation in law depends upon its nature as a form of law. Forms have been divided into *pure forms* and *limited forms,* the latter depending upon some higher form for their validity.[27] It would seem that the standard is the *pure form,* in this significance, inasmuch as it is a universal conclusion—a method of ordering which is of "uniform validity." The rule and the principle readily fall into the category fixed by the Continentals as the *limited form,* for, as has been pointed out, the principle, and a fortiori the rule, depend for their validity upon the higher or pure form, the legal standard. Conclusions which are but particular or, at most, but general, must necessarily be limited, but it is otherwise as to conclusions which are universal. Here we have an ordering of thought, the method of which, as designated by Stammler and others, is called the *pure* or *unlimited* form, for it is one of universal validity.

These differences in the nature and functioning of distinct forms suggest numerous problems and perhaps offer explanations for phenomena which have long been the subject of juristic discussion and speculation. It may be instructive to consider the variability which these forms display in the absorption of moral principles into the law to the end of obtaining some light upon the much disputed relation of law and morals.

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24. Ibid., 545-554. Particularly page 554 where the court concludes: "If now, in the light furnished by the foregoing exceptions to the general rule forbidding legislative interference with freedom of contract, we examine and analyze the statute in question, we shall find that it differs from them in every material respect."

25. See *Nesbit* "Due Process of Law and Opinion" (1926) 26 Columb. Law Rev. 23.

26. Cf. *Pound* "Law and Morals" (1924) 34, note 57.

27. "Fundamental Tendencies in Modern Jurisprudence" supra, 883.

II

Perhaps no notion is more prevalent than that one which is responsible for the belief that the law is one thing and morals another, and never the twain shall meet. Originally there must have been a close relationship between the two. Morality, evolving, as we are led to believe, from the tribal taboo, could not have been distinct from kingly fiat or the binding force of custom. Whether, for example, men in the savage state dared not eat from the king's dish from fear of disaster, inspired by a code of mingled morals and superstition, or from the fear of incurring the wrath of the sovereign may well be open to doubt or speculation. Surely the taboo was strongly felt in determining violations of both moral and legal rules. Under scientific systems of law and elaborate codes of ethics, however, the tendency has been marked to distinguish carefully the moral and the legal sanction. Austin, of course, contributed in no small degree to this distinction among English lawyers, for, as a typical example of an analytical jurist, he conceived law and morals to be distinct in every respect.[28] Law, as a general rule of external human conduct commanded by a sovereign political authority, was ideally expressed in statutes.[29] Statutes being, in the main, typical *rules* of law, we should expect to find the moral element less pronounced in the legal rule than in any other form of law. There is no place in the system of the analytical jurist for the enforcement by law of what he conceives to be purely ethical demands, and as law is "commanded by a sovereign political authority," law and morals diverge and ethical considerations are left to the science of legislation.[30] From the historical jurist's view, likewise, the distinction between law and morals is obvious, for law, as a matter of history, is always confined within the limits of what is or has been, rather than what morally or logically ought to be.[31]

Law, then, whether commanded or whether grown, is something to which morals can have but incidental and but casual significance. This, it develops, is more nearly true with respect to legal rules, which, in the main, were what Austin had in mind as law. There is nothing to retard the growth and expansion of ethical doctrine

28. See *Pound* "Theory of Judicial Decision" supra, 659.

29. *Pound* "Scope and Purpose of Sociological Jurisprudence" (1911) 24 Harv. Law Rev. 591, 595.

30. *Pound* "Interpretations of Legal History" (1923) 98-99.

31. *Clark* "Practical Jurisprudence" 16, 17.

save the experiences of man and the limits of his intellect. Law, however, as a rule, prescribing definite legal consequences for particular operative facts, may or may not coincide with ethical dogma. It is futile to expect that which must be commanded by a sovereign political authority or that which slowly evolves from custom to keep pace with moral thinking. As regards legal rules, then, law can scarcely be said to be directly related to morals, the legal sanction being distinct from the moral sanction.

What is true of the rule of law might be expected to be true of the legal principle, from the analytical and historical jurist's point of view, were it not for the effect of the legal standard. The Roman standard of *bona fides,* the common law standard of the reasonable man, as well as our Constitutional standard of due process of law demand a closer relationship between *law* and *right,* that is, between the legal and the moral. If Continental legal literature is difficult to read in English because of the double meaning of such words as *recht, droit, dritto,* etc., perhaps the common law has differentiated too much between *lex* and *jus.*[32] It is significant, however, that in all ages men have defined law in terms of right—the legal in terms of the moral. Thus Cicero spoke of law, meaning *lex*[33] as "nothing more than right reason, commanding what is right, prohibiting the contrary."[34] Cicero knew the *lex* of the *comitia,* and yet he knew what the equitable standards of the praetor had accomplished. Hence the two ideas are blended and *lex* is described in terms of *jus.*[35] St. Thomas Aquinas in the thirteenth century writes of *lex naturalis,* as the same thing as Cicero's "right reason," coming from God, but immediately from human wisdom and reason.[36] Five hundred years later Blackstone advanced in substance the same theory:

". . . This law of nature, being coeval with mankind, and dedicated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times; no human laws are of any validity if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from the original.

"But in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason, whose office is

32. See *Pound* "Theories of Law" (1912) 22 Yale Law Jour. 114, 115-116.
33. Ibid., 119.
34. "Philippics" 9-12.
35. *Pound* "Theories of Law" supra, 119-120.
36. Ibid., 123.

to discover, as was before observed, what the law of nature directs in every circumstance of life . . ."[37]

Grotius, in the seventeenth century, openly espoused the law of reason, divorcing it from theology and substituting *jus naturale* for *lex naturalis.*

In the common law, as well as in the civil law, the idea of reason has formed the mainspring of many branches of our jurisprudence. A great bulk of our law is expressed in terms of the standard of reasonableness.[38] We have the test in cases of negligence of what the reasonably prudent man would do under the same or similar circumstances. In probable cause for malicious prosecution, the question is whether or not certain circumstances were reasonably calculated to create the belief on the part of a reasonable man that plaintiff was guilty. In contract, the reasonable time within which the terms of the agreement must be fulfilled or the purchase price paid, is often the issue to be determined. Reasonable force is a vital element in self defense. In granting a new trial, the court must consider, not whether the jury, as reasonable men, ought to have come to a different conclusion upon the evidence, but whether the jury, as reasonable men, might have arrived at this particular conclusion, although the two questions were not clearly differentiated at first.[39] In construing written instruments, it is for the court to make such inferences from the written words as probably to represent the intention of the parties. It seems that the Germans are more objective still in their contract law.[40] In determining the "cooling time" necessary in cases of malice, the time necessary for the ordinary reasonable man to "cool," under the circumstances, must be the test. In reviewing legislation and in passing upon the constitutionality of state statutes under the Fourteenth Amendment, the problem is to determine whether the restrictions placed upon individual conduct or the extent to which private property is taken is reasonable, that is, whether there be a reasonable relation between the means adopted, as represented in the statute, and a legitimate object of legislative concern under the police power. Perhaps the question is whether a reasonable legislature might find such a

37. "Commentaries" (Lewis' ed. 1899) Introduction, I, sec. 2.

38. Cf. *Pound* "Law and Morals" supra, 60.

39. Cf. Lord Halsburg in *Metropolitan R. R.* v. *Wright* 11 App. Cas. 152, 156, with Lord Blackburn in *Capital Counties Bank* v. *Henty* 7 App. Cas. 774.

40. See German Civil Code sec. 145.

relationship to exist. It is difficult to tell from the cases just how objective the test is, but it is always one of reasonableness.

In every case there is a standard employed to determine the operation of a legal principle. In every case of the employment of such a standard, it is the moral judgment that is appealed to.[41] Whether rates are unreasonable or not must be determined by a direct appeal to the conscience of the court. What the courts do, in these situations, is to determine what is "right," what is just and equitable, and these are all matters of a primarily moral nature.

Now it is important to distinguish between the mere identification of law and morals, and what may be termed a complete fusion or amalgamation of the two, that is, the incorporation of the one into the other, so that it becomes an integral part thereof. A distinctly different process takes place when, because of the weight and influence of moral considerations, the rule of law is changed to accord with prevailing moral doctrine, from that which occurs when the moral standards are introduced directly into and become a part of the law. Legal rules, we have seen, may or may not accord with morality, at any given time. The *mores* of today may differ from those of yesterday, and at various periods in the law lawyers have consciously striven to bring the legal and the moral into accord.[42] A rule of law at any one time may or may not be "right," for as standards of morality, of reason and of justice undergo change, the law, remaining more fixed and stable in its rules, becomes increasingly discordant with ethics. But these standards of moral and just and right thinking become increasingly effective to change the rules of law, compelling the substitution of other rules for the old ones. Now the law tends to become more consonant with morality, or, as the Continental jurists put it, the rules of law come more in accord with the principles of "just law."[43] Technically, it may be inaccurate to insist that, be-

41. Cf. *Salmond* "Jurisprudence" (7th ed. 1924) 80, on questions of "judicial discretion."

42. *Pound* "Theory of Judicial Decision" supra, 641.

43. "Ethical doctrine must, in accordance with its fundamental idea, strive after a union with the method of just law. From the essence of ethics we draw the legitimate conclusion that it must make the rules of law the subject matter of its realization. It can be shown that the compulsory character of the law is the necessary condition of social uniformity generally, leading as it does to right regulation of the social life of man. Now it is the business of ethics to unite itself with the concrete consequences of the principles of just law and to lend to the cold and dry commands of just law the warm and fresh dream of a devoted will and an unchanging resolve to do the right. Ethics must do this or deny her own command of unconditional striving for the good. For ethical doctrine cannot find any other sphere for its realization

cause the law in a given instance is identical with "just law," law and morals are one. The sanctions for the ethical and for the legal rule are still distinct. The legal rule is not law because it is right, nor yet is the moral rule right because it is law. The one is still purely legal and the other exclusively ethical, notwithstanding the identity of content. Law and morals still have different objectives.[44] Nevertheless, in such cases, it seems equally inaccurate to regard the content of the moral and the legal rule as distinct and disconnected.

Moral standards brought about alterations in rules of law, by way of statutory enactment, in the law of defamation. The common law was explicit that proof of the truth constituted a complete defense in actions for slander, upon considerations at one time regarded as entirely adequate. No one was entitled to a better reputation than his character justly entitled him. Consequently he could not be heard to complain if nothing but the truth were spoken of him.[45] But in time statutes were passed which changed the rule and provided that the truth, in order to constitute a defense in cases of defamation, must be accompanied by proof of good motives and the existence of justifiable ends.[46] The effect of moral standards is obvious, but it is the significant thing here. What the *mores* of the earlier community approved in law in Puritanlike fashion, subsequent notions of right refused to tolerate, and moral considerations influenced legislators to change the *rule* of law to bring it in accord with changed rules of morality.

The influence of moral standards to produce a similar result by way of judicial decision may be illustrated from the later Roman law. The Law of the Twelve Tables demanded that in case one died intestate leaving no direct heir, the inheritance should pass through the male issue, thus giving the property to the grandchildren on the male side. In case there were none, the *gentile,* or collateral heir of the male should take, thus cutting off any children who might survive through the female stock. This was a rule of law, just as our statutes of like nature are rules. The praetor, perceiving that this was unfair, determined to give to all who might claim "by reason of blood kinship," although they had no valid

than that conduct which is based upon the rules of just law." *Stammler* "Theory of Justice" 70, 71. Cf. pp. 348, 349.

44. Ibid., 40.

45. See e. g., *Castle* v. *Houston* (1877) 19 Kan. 417.

46. See *Harper* "Ethical Bases of the Law of Defamation" (1926) 31 Dickinson Law Rev. 63.

claim under the civil law. The Roman state, he conceived, depended as much upon the female as upon the male stock for its continued prosperity. Consequently it was unjust and impractical for the male issue to enjoy such an advantage over the female stock. The praetor, however, was bound by the law. To circumvent the difficulty, he announced that he would treat the cognates of the first order as though they were agnates—a pure legal fiction.[47] This was called *aequitas,* or natural justice.[48] Nevertheless, it was an alteration of a fixed rule brought about by changed conditions which produced altered conceptions of morality and of fair play. The conscience of the praetor prevailed and while the moral standard did not become a part of the law, the rule of law yielded to accord with the dictates of the moral judgment.

Now it is otherwise with respect to the legal standard. Here it is the moral judgment, or the means of arriving thereat, that itself becomes the law. There is not mere conformity between law and morals which may or may not, at any given time, cease to exist. This is an identity of *matter* and a corresponding identity of *content.* But now the law has become, by fusion, one with morals to the extent to which the moral standard has become a legal one. Not only is there an identity of matter and of content, but there is now an actual identity of *form,* for the method of ordering is the same in its application to the same matter. The content is now, not by chance in accord, but necessarily so. The standard by which the moral judgment is reached is the exact one by which the legal judgment is arrived at. The law has taken over the ethical standard and clothed it with legal garb and what is moral is now law. So long as the legal standard is now applied, the result will be moral, and changed conditions, *materia,* will find corresponding alterations in ethical dogma in complete harmony with law. The effect upon legal principles is, of course, a corresponding one so far as the content is concerned, for we have seen that the principle depends upon the application of the legal standard.

It appears, then, that there is a great difference between the effect produced in law by morality acting indirectly to influence

47. See *Joseph H. Drake* "Sociological Interpretation of Law" (1918) 16 Mich. Law Rev. 599, 601. Professor Drake thinks that this is sociological interpretation, although he has since admitted some doubt in the matter. Whether it is sociological or spurious interpretation, the legal rule was changed by force of moral standards, through the use of a legal fiction.

48. *Gaius* "Dig." 38, 8, 2. See *Drake* supra, 599, note 1.

legal rules, and by acting directly by becoming amalgamated with the law through legal standards. In the former case, the content may or may not be identical between the legal rule and the moral rule. In the latter case, the content must necessarily be identical. In the first situation, the content is identical when the forms of the two happen to coincide. In the second situation the content is identical because the moral form itself has become the legal form and, the matter being the same, the content cannot differ. The result is that the moral content of the law is predominant in those forms of law which we distinguish as the legal principle and the legal standard.